

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

#### *Income Taxation Assessment Act 1997*

#### *Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025*

Section 43-153 of the *Income Taxation Assessment Act 1997* (the Act) outlines the requirements for a build to rent (BTR) development to be eligible for tax concessions made available under the Act by virtue of Schedule 1 to the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (the Amendment Act). Among other requirements, the number of dwellings in the BTR development that are ‘affordable dwellings’ must be greater than or equal to 10 per cent of the number of total dwellings in the BTR development (subparagraph 43-153(1)(d)(i) of the Act).

Subsection 43-153(2) of the Act provides that a dwelling is an ‘affordable dwelling’ if the requirements determined under subsection 43-152(3) of the Act in relation to the dwelling are met. Subsection 43-153(3) of the Act provides that the Minister may, by legislative instrument, determine the requirements relating to a dwelling.

Subsection 43-153(1) of the Act requires all dwellings in a BTR development to be made available to the public to be tenanted for a lease term of at least five years, or tenanted by way of lease as a result of being made available to the public in this way. Subsection 43-153(4) provides that if the Minister, under subsection 43-152(3) determines that affordable dwellings are dwellings made available only to a segment of the public, the reference to the public in subsection 43-153(1) should be taken to be a reference to that segment of the public for affordable dwellings.

A BTR development that meets the eligibility requirements is an ‘active BTR development’.

The purpose of the *Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025* (the Instrument) is to amend the *Income Tax Assessment (Build to Rent Developments) Determination 2024* (the Primary Instrument) to specify additional requirements for a dwelling to be an affordable dwelling. To do this, the Instrument restructures the provisions setting out the requirements, retaining the existing requirements in a new structure while also introducing additional requirements.

The Instrument amends the Primary Instrument to specify the following requirements for a dwelling in a BTR development to be an affordable dwelling:

- the dwelling must be either a moderate-income dwelling or a lower-income dwelling;
- the number of lower-income dwellings in a BTR development must be equal to or greater than two per cent of the number of dwellings in the BTR development (rounded down to the nearest whole number);
- the owner of the BTR development (BTR owner) must have engaged an eligible community housing provider (CHP) to assist the owner in:
  - identifying prospective tenants for each affordable dwelling in the BTR development; and
  - ascertaining whether the dwelling satisfies the tenant income criteria (outlined below) for a lower-income dwelling or a moderate-income dwelling (whichever criteria is applicable) for each assessing event for each affordable dwelling in the development (see section 4 of the Primary Instrument for the definition of ‘assessing event’); and
- each tenant of the dwelling was identified by an eligible CHP as a prospective tenant for the dwelling (where the dwelling is tenanted) with the CHP’s identification having regard only to the requirements for dwellings in the Instrument and any matter expressed advised to the CHP by the BTR owner.

However, there is an exception to the requirements to engage a CHP and to tenant affordable dwellings with prospective tenants identified by a CHP where special circumstances arise. This allows flexibility to ensure that these requirements do not make it impossible to tenant an affordable dwelling if, for example, no eligible CHP operates in the relevant area.

A dwelling will be a lower-income dwelling if it is tenanted or made available to be tenanted by lower-income tenants, which are tenants to which one of the following circumstances apply—

- if the tenant is an adult living alone: the adult's taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment before the dwelling's most recent assessing event was less than 75 per cent of average annual earnings (see section 4 of the Primary Instrument for the definition of 'average annual earnings');
- if the tenants are two or more adults living together, but no dependent children of the adults reside in the dwelling: the adults' combined taxable incomes, for the most recent income year, for which the Commissioner has given each adult a notice of assessment before the dwelling's most recent assessing event was less than 90 per cent of average annual earnings;
- if the tenant is an adult living with one or more of their dependent children: the adult's taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment before the dwelling's most recent assessing event was less than 100 per cent of average annual earnings; and
- if the tenants are two or more adults living with one or more dependent children of any of the adults: the adults' combined taxable incomes for the most recent income year for which the Commissioner has given each adult a notice of assessment before the dwelling's most recent assessing event was less than 100 per cent of average annual earnings.

Further, for a dwelling to be a lower-income dwelling the rent payable must not exceed the lesser of:

- 74.9 per cent of the market value of the right to occupy the dwelling under the lease (i.e. the rent otherwise payable for that dwelling in an open market); and
- 30 per cent of 'household income' (i.e. the taxable income of the adults or adults making up the household as set out in the most recent assessment by the Commissioner of Taxation) at the time of the most recent assessing event.

The Instrument also extends the definition of 'assessing event' to include a written request by a tenant of a lower-income dwelling for an annual rental review (but only the first such request from that tenant in respect of that dwelling for the financial year). This ensures that tenants of such dwellings can ask that their rent be appropriately adjusted if their income declines such that the rent would now constitute more than 30 per cent of household income, even though another assessing event might not have occurred. Recognising that it will take time to ascertain the income of the tenant and make adjustments to the rent, the amendments allow the BTR owner 60 days after the request is made to make any necessary changes to the rent.

A dwelling will be a moderate-income dwelling if:

- the rent payable under the lease for the dwelling is 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease (this criteria is identical to the requirement set out in paragraph 5(a) in the previous version of the Primary Instrument); and
- the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling's most recent assessing event for which the taxpayer has received a notice of assessment must be less than the following income thresholds, as applicable:
  - if the tenant is a single adult: 120 per cent of average annual earnings;
  - if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 130 per cent of average annual earnings; or

- if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 140 per cent of average annual earnings.

The latter requirement is the same as requirement for a dwelling to be an affordable dwelling specified in paragraph 5(b) of the previous version of the Primary Instrument.

Despite satisfying these requirements, a dwelling will not be a moderate-income dwelling if it is a lower-income dwelling.

The Instrument also provides a transitional rule for dwellings that would cease to be moderate-income dwellings or lower-income dwellings due to a change in the composition of the tenants of the dwelling (an event that satisfies paragraph (c) of the definition of ‘assessing event’ in the Primary Instrument).

The transitional rule provides that a dwelling continues to be a moderate-income dwelling or lower-income dwelling (as relevant) for 12 months after the day of the assessing event at which the tenant was found to be ineligible. However, if this would be longer than the remaining term of the lease, the transitional period is instead limited to that remaining term. This transitional rule allows owners and tenants time to make appropriate arrangements where a potentially unexpected event affects eligibility during the term of a lease.

The Instrument also makes a minor amendment to the Primary Instrument to correct an incorrect legislative reference.

The amendments made by the Instrument will apply 12 months after the amendments commence. This ensures that BTR owners have sufficient time to make changes to satisfy the new requirements.

The policy implemented by this Instrument was announced by the Minister for Housing on 28 November 2024 following passage of the primary legislation. Consultation on an exposure draft Instrument and the accompanying Explanatory Statement was undertaken on 27 March 2025 with the Property Council of Australia, the Community Housing Industry Association, and National Shelter. The objective of this consultation was to test with key stakeholders if the exposure draft Instrument gave effect to the Government’s announced policy. Following consultation, the draft instrument was amended to make the role of CHPs with respect to affordable dwellings clearer and increase the period of time a dwelling is taken to continue to satisfy the lower income dwelling criteria after a rental review from 28 days to 60 days. The Instrument is subject to disallowance under section 42 of the *Legislation Act 2003* (Legislation Act). The Instrument is also subject to the sunseting regime under section 50 of that Act.

The Instrument is a legislative instrument for the purposes of the Legislation Act.

The Instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

Details of the Instrument are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Office of Impact Analysis (OIA) was consulted on the primary legislation to which this instrument relates (OIA ref: 23-04545). An Impact Analysis was included in the Explanatory Memorandum to the Treasury Laws Amendment (Responsible Buy Now Pay Late and Other Measures) Bill 2024.

The compliance cost impact of the primary legislation was estimated to be low.

**Details of the *Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025***

**Section 1 – Name**

This section provides that the name of the instrument is the *Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025* (the Instrument).

**Section 2 – Commencement**

The Instrument commenced on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

The Instrument is made under the *Income Taxation Assessment Act 1997* (the Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to this instrument are amended or repealed as set out in the applicable items in the Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

Legislative references in this attachment are to the *Income Tax Assessment (Build to Rent Developments) Determination 2024* (the Primary Instrument) unless otherwise stated.

**Expanded Build to rent affordability standards**

The Instrument amends the Primary Instrument to:

- introduce additional requirements for dwellings in build to rent (BTR) developments to be affordable dwellings;
- provide a transitional rule to allow dwellings that would cease to be affordable dwellings due to a change in composition of the tenant household to remain an affordable dwelling for either 12 months or the remaining term of the lease, whichever is shorter; and
- make minor amendments.

**Definitions**

Item 1 of the Instrument amends paragraph (c) of the definition of ‘assessing event’ in the Primary Instrument to insert a new subparagraph (c)(iii). Subparagraph (c)(iii) provides that an assessing event occurs if an individual occupying the dwelling provides a notice under subsection 7(6) (a notice to request an annual rent review, which is discussed in the context of the explanation of section 7).

This new category of assessing event relating to a notice requesting an annual rental review has been added to accommodate circumstances that will arise in relation to the rent of the new category of lower-income dwellings, which is discussed further below.

Item 2 of the Instrument inserts three new definitions into the definitions section (section 4) of the Primary Instrument for terms introduced by the Instrument. These are:

- BTR owner – in relation to a dwelling, a BTR owner means the owner of the dwelling forming part of the BTR development. The definition is used in outlining the requirements related to engaging an

eligible CHP in relation to the affordable dwellings in paragraph 5(1)(d) and subsection 5(2) of the Instrument.

- lower income dwelling – the amendment inserts a signpost to the definition of lower income dwelling in subsection 7(1); and
- moderate income dwelling – the amendment inserts a signpost to the definition of moderate income dwelling in subsection 6(1).

### Requirements for affordable dwellings

Item 3 of the Instrument repeals and replaces section 5 of the Primary Instrument.

Previously, section 5 set out two requirements for a dwelling to be an ‘affordable dwelling’ under subsection 43-152(2) of the Act. These requirements were that:

- the rent payable under the lease for the dwelling must be 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease (i.e. the rent otherwise payable for that dwelling in an open market); and
- the dwelling must be tenanted, or made available to be tenanted, only to a tenant or prospective tenant that satisfies the applicable income threshold.

In its place, the new subsection 5 sets out three requirements the Treasurer has determined under subsection 43-153(3) of the Act as the requirements for a dwelling to be an ‘affordable dwelling’ under subsection 43-152(2) of the Act and satisfy the requirement in paragraph 43-153(1)(d) that 10 per cent of dwellings in an active build to rent development must be affordable dwellings. Subsection 5(1) provides that the requirements to be an ‘affordable dwelling’ are that:

- the dwelling is either a ‘moderate-income dwelling’ (which is discussed in the context of the explanation of section 6) or a ‘lower-income dwelling’ (which is discussed in the context of the explanation of section 7);
- the dwelling is part of a BTR development in which the number of lower-income dwellings is equal to or greater than:
  - 2 per cent of the number of dwellings in the BTR development (where the 2 per cent figure is a whole number); or
  - 2 per cent of the number of dwellings in the BTR development, rounded down to the nearest whole number (where that 2 per cent figure is not a whole number); and
- the dwelling is part of a BTR development that satisfies subsection 5(2), which requires that the BTR owner to engage an eligible community housing provider (CHP) to assist:
  - in identifying prospective tenants for each affordable dwelling in the BTR development; and
  - with the ascertainment, by the BTR owner, of whether the dwelling satisfies the applicable criteria in subsection 6(2) or 7(2) for each assessing event for each affordable dwelling in the development. Effectively, this requires assistance with ascertaining whether tenants and prospective tenants fall or would fall within the circumstances set out in subsection 6(2) or 7(2) (relating to the household income of the tenants) for each assessing event in relation to each affordable dwelling in the development; and
- if the dwelling is tenanted, then each tenant must have been identified as a prospective tenant by an eligible CHP, having regard only to the requirements of the Instrument and any matter advised by the BTR owner.

However, there is an exception to the requirements to engage a CHP and to tenant affordable dwellings with prospective tenants identified by a CHP where special circumstances arise. This allows flexibility to ensure

that the requirements do not make it impossible to tenant an affordable dwelling if, for example, no eligible CHP operates in the relevant area.

*Requirement that the dwelling is either a moderate-income dwelling or a lower-income dwelling*

Paragraph 5(1)(a) sets out the first requirement for a dwelling to be an affordable dwelling, which is that the dwelling is either a moderate-income dwelling or a lower-income dwelling. These two sub-categories of affordable dwellings are discussed in the context of the explanations of sections 6 and 7.

The requirements for a dwelling to be an affordable dwelling previously set out in the Primary Instrument have been integrated into the definitions of these sub-categories. Specifically, it is a requirement of both sub-categories that the rent for the dwelling cannot exceed 74.9 per cent of the market rent for the dwelling. Likewise, the requirements about the income of tenants set out in paragraph 5(b) in the previous version of the Primary Instrument now form part of the definition of moderate-income dwelling, while the definition of lower-income dwelling contains separate lower income thresholds. As a result, both requirements found in section 5 of the previous version of the Primary Instrument have been removed as separate requirements from the list of requirements.

*Requirement that the dwelling is part of a BTR development in which at least 2 per cent of the dwellings are lower-income dwellings*

Paragraph 5(1)(b) sets out the second requirement for a dwelling to be an affordable dwelling, which is that the dwelling is part of a BTR development in which the number of lower-income dwellings is equal to or greater than 2 per cent of number of dwellings in the BTR development.

For example, an entity owns an active BTR development. The development has 100 dwellings; consisting of 90 non-affordable dwellings and 10 affordable dwellings. For the development to satisfy this requirement, at least two of the dwellings in the development must be lower-income dwellings (the 2 per cent figure results in a whole number).

In some cases, 2 per cent of the number of dwellings in a BTR development will not be a whole number. In such cases, the number must be rounded down to the nearest whole number to determine the minimum number of lower-income dwellings that must be tenanted or available to be tenanted as lower-income dwellings. As an example, an entity owns an active BTR development. The development has 122 dwellings; consisting of 110 non-affordable dwellings and 12 affordable dwellings. To satisfy this requirement, at least two of the dwellings in the development must be lower-income dwellings (rounded down from 2.44 dwellings).

*Requirement that the dwelling be part of a BTR development that satisfies certain requirements with respect to CHPs*

Paragraph 5(1)(c) sets out the third requirement for a dwelling to be an affordable dwelling, which is that the dwelling is part of a BTR development that satisfies subsection 5(2).

Subsection 5(2) provides that a BTR development satisfies the subsection if the owner of the dwellings that form the BTR development (the BTR owner) engages an eligible CHP to assist the BTR owner:

- in identifying prospective tenants for each affordable dwelling in the BTR development; and
- with the ascertainment, by the BTR owner, of whether the dwelling satisfies the applicable criteria in subsection 6(2) or 7(2) for each assessing event for each affordable dwelling in the development. Essentially, this requires assistance with ascertaining whether tenants and prospective tenants fall or would fall within the circumstances set out in subsection 6(2) or 7(2) (relating to the household income of the tenants) for each assessing event in relation to each affordable dwelling in the development.

Effectively, to satisfy this requirement, the BTR owner must engage an eligible CHP to identify and recommend suitable prospective tenants to occupy the affordable dwellings.

'Eligible community housing provider' is defined in section 980-10 of the Act as an entity that is registered (however described) either under an Australian law or by an Australian government agency as a provider of community housing services. In effect it includes entities formally recognised as community housing providers by any Australian government, whether in law or through administrative processes. An entity remains an eligible community housing provider for 90 days after being deregistered. This provides BTR owners time to make suitable arrangements with an eligible CHP if the CHP they had engaged ceases to be an eligible CHP.

To avoid doubt, it is not a requirement that the eligible CHP must have the final say on the selection of tenants. The requirement is only that a CHP must be engaged to provide an advisory service to the BTR owner and identify prospective tenants. The BTR owner must satisfy itself independently that the prospective tenants satisfy the eligibility criteria.

Further, this requirement only relates to CHP involvement in matters relating to assisting the BTR owner in finding prospective tenants for the affordable dwellings; and assisting the BTR owner in the BTR owner's ascertainment of whether tenants and prospective tenants fall within the circumstances set out in subsections 6(2) and 7(2). It has no bearing on the responsibility for the tenancy agreement with a tenant and the responsibility for managing the physical dwelling occupied by the tenant.

#### Requirement that the tenant of a dwelling must have been identified by a CHP

Paragraph 5(1)(d) sets out the last requirement for a dwelling to be an affordable dwelling, which is that, if the dwelling is tenanted, then each tenant must have been identified (i.e. recommended) as a suitable tenant by an eligible CHP, having regard only to the requirements of the Instrument and any other matters expressly indicated by the BTR owner. In effect this means that in usual circumstances a BTR owner can only select tenants for an affordable dwelling from among those put forward by eligible CHPs.

To avoid doubt, it is not a requirement that the eligible CHP must have the final say on the selection of tenants. The BTR owner is free to choose among all recommended tenants or, indeed, to choose none of the recommended tenants and seek further recommendations. Similarly, while recommendations made by the eligible CHP should have regard to the requirement set out in the Instrument, it remains the responsibility of the BTR owner to determine the eligibility of tenants – at most the recommendations and information provided by CHPs may assist in this process.

#### Exception to requirements relating to CHPs

Subsection 5(3) provides an exception to the requirements relating to CHPs (requirements in paragraphs 5(1) (c) to (d)) where special circumstances arise. This allows flexibility to ensure that these requirements do not make it impossible to tenant an affordable dwelling if, for example, no eligible CHP operates in the relevant area.

#### Meaning of moderate-income dwelling

Item 3 of the Instrument inserts section 6, which defines when dwellings are moderate-income dwellings.

A dwelling will be a moderate-income dwelling if:

- the income of the tenants meets the requirement for a dwelling to be an affordable dwelling specified in paragraph 5(b) of the previous version of the Primary Instrument. Specifically, the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling's most recent assessing event for which the taxpayer has received a notice of assessment must be less than the following income thresholds, as applicable:
  - if the tenant is a single adult: 120 per cent of average annual earnings;
  - if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 130 per cent of average annual earnings; or

- if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 140 per cent of average annual earnings; and
- the rent payable under the lease for the dwelling is 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease (i.e. the rent otherwise payable for that dwelling in an open market).

‘Average annual earnings’ is defined in section 4 of the Primary Instrument as, broadly, the most recent figure for ‘full time adult average weekly ordinary time earnings - original’ as published by the Australian Statistician multiplied by 52.

Both these requirements are the same two requirements for a dwelling to be an affordable dwelling that were set out in the former section 5 of the Primary Instrument. A dwelling that satisfied those requirements meets the definition of a moderate-income dwelling.

However, there is one case where a dwelling that met the previous requirements may not be a moderate-income dwelling. Even if a dwelling satisfies all these requirements, paragraph 6(1)(b) of the Instrument provides that a dwelling will not be a moderate-income dwelling if it is a lower-income dwelling.

### Meaning of lower-income dwelling

Item 3 of the Instrument also inserts section 7, which defines when dwellings are lower-income dwellings.

### *Requirements relating to tenant income*

The first requirement for a dwelling to be a lower-income dwelling is that the tenant or prospective tenant of the dwelling must be a tenant or tenants to which one of the following circumstances applied at the time of the most recent assessing event (defined in section 4 of the Primary Instrument as, broadly, the beginning of a lease, the end of a lease, a change in household composition or the receipt of a notice requesting an annual rental review, the last of which is discussed further below)—

- if the tenant is an adult living alone: the adult’s taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment was less than 75 per cent of average annual earnings;
- if the tenants are two or more adults living together, but no dependent children of the adults reside in the dwelling: the adults’ combined taxable incomes for the most recent income year for which the Commissioner has given each adult a notice of assessment was less than 90 per cent of average annual earnings;
- if the tenant is an adult living with one or more of their dependent children: the adult’s taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment was less than 100 per cent of average annual earnings; and
- if the tenants are two or more adults living with one or more dependent children of any of the adults: the adults’ combined taxable incomes for the most recent income year for which the Commissioner has given each adult a notice of assessment was less than 100 per cent of average annual earnings.

The requirement seeks to reserve a proportion of affordable dwellings in a BTR development for lower-income tenants. The income limits to be considered a lower-income tenant are selected to support the needs of lower-income tenants while also incentivising continued investment in rental housing stock (including affordable tenancies).

### *Requirements relating to the rent payable under the lease for the lower-income dwelling*

The second requirement for a dwelling to be a lower-income dwelling is that the rent payable under the lease for the dwelling must not exceed the lesser of:



- 74.9 per cent of the market value of the right to occupy the dwelling under the lease; and
- 30 per cent of ‘household income’ (i.e. taxable income of an adult for single-adult households or combined taxable income of adults for multi-adult households) as at the time of the most recent assessing event.

The requirement seeks to support lower-income tenants with rental affordability and to strengthen rental outcomes for affordable dwellings.

In order to ensure this requirement is effective, the Instrument allows tenants in a lower-income dwelling to, once each financial year, request a review of their household income by providing written notice to the BTR owner. The notice would need to be accompanied by such information and documents as may be provided for in the rental agreement (for example, the rental agreement may require the notice be accompanied by evidence of the most recent income tax assessment of the tenants to expedite the review process). The receipt of this notice would be an assessing event.

As a result, if the household income of the tenants of the property has changed as at the date of the request, the BTR owner would need to adjust the rent if it would exceed to 30 per cent of household income, in the same way as at the time of any other assessing event. However, recognising it may take some time for the tenant’s income to be determined after receiving notice of a request, the BTR owner has 60 days after the receipt of the request to make any required change to the rent of the dwelling.

The annual rental review mechanism allows the rent to be appropriately adjusted if the tenant’s household income changes.

*Transitional rule for dwellings that would cease to be affordable dwellings due to a change in the composition of the tenants of the dwelling*

The new subsections 6(3) and 7(3) provide a transitional rule for dwellings that would cease to be moderate-income dwellings or lower-income dwellings due to a change in the composition of the tenants of the dwelling (an event that satisfies paragraph (c) of the definition of assessing event in section 4).

The transitional rule provides that a dwelling continues to be a moderate-income dwelling or lower-income dwelling (as relevant) for 12 months after the day of the assessing event at which the tenant was found to be ineligible. However, if this would be longer than the remaining term of the lease, the transitional period is instead limited to that remaining term. Additionally, if another assessing event happens during a period in which a dwelling is only a moderate-income dwelling or a lower-income dwelling due to an ongoing transitional period, that ongoing period will not be extended. Instead, the transitional period for the subsequent assessing event will end at the same time as the ongoing transitional period.

This transitional rule allows BTR owners and tenants time to make appropriate arrangements where one or more potentially unexpected events affect the eligibility of tenants during the term of a lease.

*Interaction with other laws*

Other Commonwealth, State or Territory laws may impose requirements in respect of a set of dwellings in relation to affordable housing or for other similar purposes. For example, a State planning law may require a development contain dwellings meeting affordability standards. Whether a dwelling meets those other requirements is not relevant when determining if a dwelling is an affordable dwelling or a development is an active BTR development. Nothing in this Instrument prevents a dwelling from satisfying the requirements of this Instrument solely because it also satisfies any requirements imposed by other laws.

*Minor editorial amendments*

Item 3 of the Instrument also makes a minor amendment to the Primary Instrument to correct an incorrect legislative reference. The item removes the incorrect reference to subsection 45-153(3) in section 5 and replaces it with the correct reference to subsection 43-153(3).

*Application provision*

Item 4 of the Instrument amends the Primary Instrument to insert a new section, section 100, as the first provision in the new Division 1 to the new Part 10 of the Primary Instrument dealing with transitional provisions, including application provisions. Division 1 covers transitional provisions relating to the Instrument.

Section 100 provides that the amendments made by the Instrument will apply in relation to a dwelling 12 months after the amendments commence. This ensures that BTR owners have sufficient notice of the new requirements to allow them time to make any necessary changes to their arrangements or proposed arrangements.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

Section 43-153 of the *Income Taxation Assessment Act 1997* (the Act) outlines the requirements for a build to rent (BTR) development to be eligible for tax concessions made available under the Act by virtue of Schedule 1 to the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (the Amendment Act). Among other requirements, the number of dwellings in the BTR development that are ‘affordable dwellings’ must be greater than or equal to 10 per cent of the number of total dwellings in the BTR development (rounded down to the nearest whole number; subparagraph 43-153(1)(d)(i) of the Act).

Subsection 43-153(2) of the Act provides that a dwelling is an ‘affordable dwelling’ if the requirements determined under subsection 43-152(3) of the Act in relation to the dwelling are met. Subsection 43-153(3) of the Act provides that the Minister may, by legislative instrument, determine the requirements relating to a dwelling.

Subsection 43-153(1) of the Act requires all dwellings in a BTR development to be made available to the public to be tenanted for a lease term of at least five years, or tenanted by way of lease as a result of being made available to the public in this way. Subsection 43-153(4) provides that if the Minister, under subsection 43-152(3) determines that affordable dwellings are dwellings made available only to a segment of the public, the reference to the public in subsection 43-153(1) should be taken to be a reference to that segment of the public for affordable dwellings.

A BTR development that meets the eligibility requirements is an ‘active BTR development’.

The purpose of the *Income Tax Assessment (Build to Rent Developments) Amendment (Expanding Affordability Requirements) Determination 2025* (the Instrument) is to amend the *Income Tax Assessment (Build to Rent Developments) Determination 2024* (the Primary Instrument) to specify additional requirements for a dwelling to be an affordable dwelling. To do this, the Instrument restructures the provisions setting out the requirements, retaining the existing requirements in a new structure while also introducing additional requirements.

The Instrument amends the Primary Instrument to specify the following requirements for a dwelling in a BTR development to be an affordable dwelling:

- the dwelling must be either a moderate-income dwelling or a lower-income dwelling;
- the number of lower-income dwellings in a BTR development must be equal to or greater than two per cent of the number of dwellings in the BTR development (rounded down to the nearest whole number); and
- the owner of the BTR development (BTR owner) must have engaged an eligible community housing provider (CHP) to assist the owner in:
  - identifying prospective tenants for each affordable dwelling in the BTR development; and
  - ascertaining whether the dwelling satisfies the tenant income criteria for a lower-income dwelling or a moderate-income dwelling (whichever criteria is applicable) for each assessing event for

each affordable dwelling in the development (see section 4 of the Primary Instrument for the definition of ‘assessing event’); and

- each tenant of the dwelling was identified by an eligible CHP as a prospective tenant for the dwelling (where the dwelling is tenanted) with the eligible CHP’s identification having regard only to the requirements for dwellings in the Instrument and any matter expressed advised to the CHP by the BTR owner.

However, there is an exception to the requirements to engage a CHP and to tenant affordable dwellings with prospective tenants identified by a CHP where special circumstances arise. This allows flexibility to ensure that these requirements do not make it impossible to tenant an affordable dwelling if, for example, no eligible CHP operates in the relevant area.

A dwelling will be a lower-income dwelling if it is tenanted or made available to be tenanted by lower-income tenants, which are tenants to which one of the following circumstances apply—

- if the tenant is an adult living alone: the adult’s taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment before the dwelling’s most recent assessing event was less than 75 per cent of average annual earnings (see section 4 of the Primary Instrument for the definition of ‘average annual earnings’);
- if the tenants are two or more adults living together, but no dependent children of the adults reside in the dwelling: the adults’ combined taxable incomes, for the most recent income year, for which the Commissioner has given each adult a notice of assessment before the dwelling’s most recent assessing event was less than 90 per cent of average annual earnings;
- if the tenant is an adult living with one or more of their dependent children: the adult’s taxable income for the most recent income year for which the Commissioner has given the adult a notice of assessment before the dwelling’s most recent assessing event was less than 100 per cent of average annual earnings; and
- if the tenants are two or more adults living with one or more dependent children of any of the adults: the adults’ combined taxable incomes for the most recent income year for which the Commissioner has given each adult a notice of assessment before the dwelling’s most recent assessing event was less than 100 per cent of average annual earnings; and

Further, for a dwelling to be a lower-income dwelling the rent payable must not exceed the lesser of:

- 74.9 per cent of the market value of the right to occupy the dwelling under the lease (i.e. the rent otherwise payable for that dwelling in an open market); and
- 30 per cent of ‘household income’ (i.e. the taxable income of the adults or adults making up the household as set out in the most recent assessment by the Commissioner of Taxation) at the time of the most recent assessing event.

The Instrument also extends the definition of ‘assessing event’ to include a written request by a tenant of a lower-income dwelling for an annual rental review (but only the first such request from that tenant in respect of that dwelling for the financial year). This ensures that tenants of such dwellings can ask that their rent be appropriately adjusted if their income declines such that the rent would now constitute more than 30 per cent of household income, even though another assessing event might not have occurred. Recognising that it will take time to ascertain the income of the tenant and make adjustments to the rent, the amendments allow the BTR owner 60 days after the request is made to make any necessary changes to the rent.

A dwelling will be a moderate-income dwelling if:

- the rent payable under the lease for the dwelling is 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease (this criteria is identical to the requirement set out in paragraph 5(a) in the previous version of the Primary Instrument); and

- the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling's most recent assessing event for which the taxpayer has received a notice of assessment must be less than the following income thresholds, as applicable:
  - if the tenant is a single adult: 120 per cent of average annual earnings;
  - if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 130 per cent of average annual earnings; or
  - if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 140 per cent of average annual earnings.

The latter requirement is the same as requirement for a dwelling to be an affordable dwelling specified in paragraph 5(b) of the previous version of the Primary Instrument.

Despite satisfying these requirements, a dwelling will not be a moderate-income dwelling if it is a lower-income dwelling.

The Instrument also provides a transitional rule for dwellings that would cease to be moderate-income dwellings or lower-income dwellings due to a change in the composition of the tenants of the dwelling (an event that satisfies paragraph (c) of the definition of 'assessing event' in the Primary Instrument).

The transitional rule provides that a dwelling continues to be a moderate-income dwelling or lower-income dwelling (as relevant) for 12 months after the day of the assessing event at which the tenant was found to be ineligible. However, if this would be longer than the remaining term of the lease, the transitional period is instead limited to that remaining term. This transitional rule allows owners and tenants time to make appropriate arrangements where a potentially unexpected event affects eligibility during the term of a lease.

The Instrument also makes a minor amendment to the Primary Instrument to correct an incorrect legislative reference.

The amendments made by the Instrument will apply 12 months after the amendments commence. This ensures that BTR owners have sufficient time to make changes to satisfy the new requirements.

## **Human rights implications**

This Instrument engages the following rights:

- Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the right to an adequate standard of living; and
- Article 12(1) of the ICESCR – the right to health.

### ***Right to an adequate standard of living, including food, water and housing***

This Instrument engages the right to an adequate standard of living, including food, water and housing under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to an adequate standard of living provides that Australia must take appropriate steps towards the realisation of this right in its jurisdiction, and that the relevant standard must be continuously improving.

The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has stated that the 'right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights'.<sup>[1]</sup> The Committee has highlighted the importance of housing affordability as part of this right:

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised ... States parties

should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs.<sup>[2]</sup>

This Instrument improves the standard of living in Australia by seeking to improve housing outcomes for Australians. The Instrument sets the requirements for an affordable dwelling in an active BTR development. It requires that for a dwelling to be affordable dwelling:

- the dwelling must be a moderate-income dwelling or a lower-income dwelling;
- the number of lower-income dwellings in a BTR development must be equal to or greater than two per cent of the number of dwellings in the BTR development (rounded down to the nearest whole number); and
- the BTR owner must have engaged an eligible CHP to assist the owner in:
  - identifying prospective tenants for each affordable dwelling in the BTR development; and
  - ascertaining whether the dwelling satisfies the tenant income criteria (outlined below) for a lower-income dwelling or a moderate-income dwelling (whichever criteria is applicable) for each assessing event for each affordable dwelling in the development (see section 4 of the Primary Instrument for the definition of ‘assessing event’); and
- each tenant of the dwelling was identified by an eligible CHP as a prospective tenant for the dwelling (where the dwelling is tenanted) with the eligible CHP’s identification having regard only to the requirements for dwellings in the Instrument and any matter expressed advised to the CHP by the BTR owner.

However, there is an exception to the requirements to engage a CHP and to tenant affordable dwellings with prospective tenants identified by a CHP where special circumstances arise. This allows flexibility to ensure that these requirements do not make it impossible to tenant an affordable dwelling if, for example, no eligible CHP operates in the relevant area.

To be considered a ‘moderate-income dwelling’, the rent payable under a lease for the dwelling must be capped at 74.9 per cent of the rent otherwise payable for that dwelling in an open market; and the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling’s most recent assessing event for which the taxpayer has received a notice of assessment must be less than the following income thresholds, as applicable:

- if the tenant is a single adult: 120 per cent of average annual earnings;
- if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 130 per cent of average annual earnings; or
- if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 140 per cent of average annual earnings.

Similarly, to be considered a ‘lower-income dwelling’, the rent payable under a lease for the dwelling must be capped at the lower of 74.9 per cent of the rent otherwise payable for that dwelling in an open market or 30 per cent of the ‘household income’ (i.e. taxable income of the tenant or combined taxable incomes of the tenants, where relevant) as at the time of the most recent assessing event. Additionally, the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling’s most recent assessing event for which the taxpayer has received a notice of assessment must be less than the following income thresholds, as applicable:

- if the tenant is a single adult: 75 per cent of average annual earnings;
- if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 90 per cent of average annual earnings; or

- if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 100 per cent of average annual earnings.

These eligibility requirements for ‘moderate-income dwellings’ and ‘lower-income dwellings’ relate to the rent payable under the lease for the dwelling and the income of the tenant or prospective tenant. The income thresholds are dependent on a person’s or persons’ circumstances – i.e. whether they live alone, or live with one or more adults, or live with one or more adults and one or more dependent children.

The income thresholds to be considered a lower-income tenant or a moderate-income tenant are selected to support the needs of lower-income tenants and moderate-income tenants while also incentivising continued investment in rental housing stock (including affordable tenancies). These income threshold eligibility requirements seek to support lower- and moderate-income earners in Australia to access housing by excluding access to those above the income thresholds, who may be able to outcompete lower- and moderate-income earners for access to dwellings due to higher incomes. Additionally, the rent payable requirements (requiring maximum rent charged to be discounted) seek to support lower-income tenants and moderate-income tenants with rental affordability and to strengthen rental outcomes for the affordable dwellings.

These eligibility requirements will support lower- and moderate-income earners across Australia, and particularly in well-located areas that are proximate to schools, hospitals and public transport connections – which is where many BTR developments are, or are expected to be, located. In recent years, these metropolitan areas have experienced increases in rents that have reduced the capacity for lower- and middle-income earners to rent in these areas.

Additionally, the Instrument reserves a proportion of dwellings in a BTR development for lower-income tenants (specifically at least 2 per cent of the dwellings in a BTR development must be lower-income dwellings). This requirement seeks to ensure BTR developments make available a certain proportion of dwellings for lower-income earners and thereby supporting an adequate standard of housing for lower-income earners.

Thus, this Instrument allows Australians to meet an adequate standard of housing and, in-so-doing, supports the attainment and satisfaction of their other needs. This Instrument therefore promotes the right to an adequate standard of living, including food, water and housing.

### ***Right to health***

The Instrument engages the right to health under Article 12 of the ICESCR.

Article 12 of the ICESCR protects the right of all individuals to enjoy the highest attainable standards of physical and mental health. The Committee has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, which includes housing.

The Instrument supports the right to health by increasing access to rental housing for lower- and moderate-income earners in Australia through requiring lower-income dwellings and moderate-income dwellings to be made available for rent, and rented at a discount relative to rent payable on the open market (with rent for a lower-income dwelling capped at no more than 74.9 per cent of the rent otherwise payable for that dwelling in an open market or 30 per cent of ‘household income’, whichever is lower; and rent for a moderate-income dwelling capped at no more than 74.9 per cent of the rent otherwise payable for that dwelling in an open market). Further, access to these lower-income dwellings and moderate-income dwellings is limited to those whose average annual earnings are within the relevant income threshold – for example, adult living alone, or two or more adults living together, or one or more adults living together with one or more dependent children. These requirements seek to make the lower-income dwellings and moderate-income dwellings in an active BTR development affordable to people on lower- and moderate-incomes. In-so-doing, the Instrument improves the right to health by improving access to housing for these cohorts.

### **Conclusion**

The Instrument is compatible with human rights because it supports the right to an adequate standard of living, and the right to health.

The Instrument does not raise any other human rights issues.

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<sup>[1]</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant), paragraph 1

<sup>[2]</sup> As above, paragraph 8(c)